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No. _____

In The

Supreme Court of the United States

October Term, 1996

SCHNUCK MARKETS, INC.,

Petitioner,

v.

MICHAEL LUECKE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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66 pp

QUESTIONS PRESENTED

1. Whether a unilaterally implemented drug policy is a term and condition of employment contemplated by the collective bargaining agreement and which therefore must be interpreted in order to resolve state claims premised upon actions taken under that policy.

2. Whether a state-law tort claim is preempted under Section 301 of the Labor Management Relations Act by a defense based on rights exercised by an employer pursuant to a collective bargaining agreement and drug testing policy.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Schnuck Markets, Inc., respectfully prays that a Writ of Certiorari be issued to review the judgment for the Eighth Circuit Court of Appeals entered in this proceeding June 4, 1996.

OPINIONS

The ruling of the United States District Court for the Eastern District of Missouri which granted Schnucks' Motion for Summary Judgment is unreported. The ruling of the Eighth Circuit Court of Appeals which reversed the District Court's grant of Summary Judgment is reported at 85 F.3d 356 (8th Cir. 1996). The ruling of the Eighth Circuit Court of Appeals which denied Schnucks' Petition for Rehearing and Suggestion for Rehearing En Banc is unreported. The decisions are reprinted in Appendices A-C, *infra*.

STATEMENT OF JURISDICTION

The decision of the Eighth Circuit Court of Appeals was entered on June 4, 1996, and the Petition for Rehearing was denied on July 24, 1996. This Court's jurisdiction to consider civil cases in the courts of appeals is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 301 of the Labor Management Relations Act in pertinent part as set out below: 29 U.S.C., § 185. Suits by and against labor organizations. . . .

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, . . . may be brought in

any district court in the United States having jurisdiction of the parties. . . .

STATEMENT OF THE CASE

The Plaintiff below, Michael Luecke ("Luecke"), initiated an action in the Circuit Court of the County of St. Louis, Missouri asserting a claim for defamation against Defendant, Schnuck Markets, Inc. ("Schnucks"). Luecke's action is predicated primarily upon a telephone call between a Company representative and Luecke's wife in which Schnucks' representative, in the course of her investigation and enforcement of the Company's drug testing policy, stated that Luecke had been injured at work, that he failed to take a drug test and that his employment could be terminated if he did not take the drug test. Schnucks removed the action to the United States District Court for the Eastern District of Missouri pursuant to 28 U.S.C. § 1441(b). On June 28, 1995, the district court entered summary judgment in favor of Schnucks' finding that Luecke's state-law defamation claim is pre-empted by § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 151, *et seq.*, because the defamation claim is inextricably intertwined with consideration of the terms of the collective bargaining agreement. On June 4, 1996, the court of appeals reversed the decision of the district court and held that the LMRA did not pre-empt Luecke's defamation claim. The Eighth Circuit remanded the case to the district court with instructions to remand it to the state court from which it was removed. On July 24, 1996, the court of appeals denied Schnucks' petition for rehearing and suggestion for rehearing en banc.

Luecke is employed by Schnucks, is a member of the United Food and Commercial Workers, Local No. 88, AFL-CIO ("Local 88" or "Union"), and was covered by

the applicable collective bargaining agreement in effect when the incidents in question took place. Article V, the Management Rights Clause, of the agreement provides:

> The Management of the business and the direction of the working forces, including the right to plan, direct and control operations, hire, suspend or discharge for proper cause, transfer or relieve employees from duty because of lack of work, or for other legitimate reasons, shall be vested in the Employer, provided, however, that it will not be used for the purpose of discrimination against any employee, and provided it shall in no way conflict with any of the terms of this Agreement.

(Appendix D-4.)

Pursuant to this provision, Schnucks, after bargaining with the Union and notifying employees, unilaterally implemented a drug and alcohol policy in September of 1992, which provides that when an employee sustains an on-the-job injury which results in a "lost time situation" the employee will be required to submit to a blood and/or urinalysis test as a routine part of the investigation of the circumstances present at the time of the accident. (Appendix E-3.) Subsequent to the incident in question, Schnucks and Local 88 expressly incorporated the drug and alcohol policy into the current collective bargaining agreement. Both the 1992 and the current collective bargaining agreement include a grievance and arbitration procedure which provides:

> *Section 6.1.* If any differences, disputes or complaints arise over the interpretation or application of the contents of this Agreement, there shall be an earnest effort on the part of the parties to settle such promptly through the following steps:

* * *

> *Section 6.5.* It is understood and agreed that all employees within the bargaining unit covered by this Agreement must exercise all their rights, privileges or necessary procedures under this Agreement, International and Local Union Constitution, in the settlement of any and all complaints or grievances filed by such employees, before taking any action outside of the scope of this Agreement for the settlement of such grievances.

(Appendix D-5.)

On November 10, 1992, Luecke injured his hand at work. He received treatment at a Schnucks' selected medical facility, which asked Luecke to disrobe in order to give a urine sample for drug testing pursuant to Schnucks' drug policy. Luecke refused to take the drug test.[1] On that same date, Jenise Kramer, Schnucks' Manager of Equal Employment Opportunity and Counseling, whose duties included the administration of Schnucks' drug policy, called Luecke's home and asked to speak to him. Luecke's wife told Kramer that Luecke was not at home. Kramer then allegedly told Mrs. Luecke that her husband had been injured at work, that he had failed to take a drug test, and that his employment would be terminated if he did not submit to a drug test.[2] Kramer and Luecke spoke on November 11, and the following

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[1] There is a dispute over the facts surrounding Luecke's failure to take the test as to whether his refusal was based on his failure to disrobe or whether he merely refused to be tested.

[2] Schnucks disputes the accuracy of these allegations and maintains that Mrs. Luecke was told only that her husband needed to call Jenise Kramer as soon as possible and that refusal to take a drug test could be grounds for discharge.

day Luecke took a drug test, which was negative. No discipline followed.

In October, 1994 Luecke initiated an action in the Missouri state court for defamation alleging that Kramer and other Schnucks' employees, acting within the scope of their employment and with the apparent authority of Schnucks, published to Luecke's wife and otherwise within the Company the allegedly false statement that Luecke had "refused" to take a drug test.

In its removal, Schnucks maintained that Luecke's suit was in substance a grievance concerning the implementation or manner of implementation (including permitted communications) of Schnucks' drug testing policy enacted pursuant to the Management Rights Clause of the applicable collective bargaining agreement. Schnucks then filed a Motion for Summary Judgment arguing that Luecke's cause of action for slander is pre-empted under the LMRA, because the resolution of that state law claim is substantially dependent upon the analysis of the terms of the collective bargaining agreement. Schnucks specifically maintained that the pre-emption issue needed to be resolved on the basis of Schnucks' defenses, as well as Luecke's claims, in determining whether resolution of the state claim requires an interpretation of the collective bargaining agreement.

Schnucks maintained: 1) Kramer's communications were permitted and privileged under corporate procedures and under the collective bargaining agreement; 2) Kramer, as a part of her duties and responsibilities, was required to engage in the communications; 3) this dispute is over an event which occurred at the workplace which is governed by the grievance procedures set forth

in the collective bargaining agreement.[3] Schnucks contended that because Luecke's claim is pre-empted by the LMRA it is also time-barred, because Luecke did not file a grievance within ten days of the occurrence and because the action was not initiated within the six month statute of limitations applicable to the National Labor Relations Act, 29 U.S.C., § 160(b).

The district court concluded that the removal was proper and granted summary judgment in Schnucks' favor on the basis of pre-emption. In so holding, the district court recognized the "well-pleaded complaint" rule that for federal question jurisdiction, the federal question must appear on the face of the complaint. However, the district court applied the exception to that rule that when "an area of state law has been completely pre-empted, any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar v. Williams*, 482 U.S. 386, 392-393, 107 S.Ct. 2425, 2429-2430, 96 L.Ed.2d 318 (1987). The district court held that complete pre-emption applies to § 301 of the LMRA and reasoned that § 301 pre-empts state tort claims where resolution of the claim is inextricably intertwined with the terms of the labor contract. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 105 S.Ct. 1904, 1912, 85 L.Ed.2d

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[3] The irony of the instant dispute is that the Eighth Circuit implies within its analysis that Luecke's claim would be pre-empted if he had been terminated for refusing to take a drug test pursuant to the Management Rights Clause of the labor agreement which grants to Schnucks " . . . the right to discharge for proper cause . . . " (Appendix D-4.) Thus, the court of appeals has created, by its holding, an artificial mechanism allowing Luecke to bring a state tort claim over his refusal to take the test when he was not disciplined but where his action would have been pre-empted had he been discharged.

206 (1985). The district court, citing *Hanks v. General Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988), held that in determining whether resolution of the state law claim requires construction of the labor agreement, defenses as well as claims must be considered. (Appendix B-4.) The district court found Luecke's defamation claim to be inextricably intertwined with the terms of the bargaining agreement and pre-empted, because Luecke alleges that Kramer made the slanderous statements within the scope of her employment and, "the statements in question involve the ongoing employment relationship between Plaintiff and Defendant and concern a work-related injury and its subsequent investigation." (Appendix B-5.)

The Eighth Circuit reversed and found Luecke's defamation claim not pre-empted by § 301, because the central factual inquiry needed in order to resolve the state claim did not require an interpretation of the bargaining agreement. The court further held that Schnucks' defense of privilege would also not require reference to the labor agreement, because the Management Rights Clause did not address the procedures to be followed in conducting investigations, and the drug testing policy which granted to Schnucks the right to investigate, and disseminate necessary information incident to the investigation to other parties, was not expressly incorporated into the applicable collective bargaining agreement. In this regard, the court of appeals stated:

> We need not, and do not, decide whether a defamation claim of the type brought here would be pre-empted under these express terms; it is enough that the earlier controlling agreement was entirely devoid of such terms. To be sure, two months before the present incident, management had unilaterally promulgated a written drug testing policy which included the same confidentiality provision. But absent its

> incorporation within the collective bargaining agreement – or absent incorporation of a compatible management rights clause, e.g., covering the performance of medical examinations, or some long standing practice or custom from which to infer incorporation – we do not believe that Schnucks' *unilateral* adoption of the policy rendered its language, in these circumstances, a literal part of the agreement for purposes of the test set out in *Lingle*.

Luecke, 85 F.3d at 361-362. (Appendix A-13.)

In so deciding, the court of appeals recognized that this holding was not in accord with the opinions of the Ninth Circuit in *Schlacter-Jones v. Gen. Tel. of Calif.*, 936 F.2d 435, 441 (9th Cir. 1991), the First Circuit in *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 118, 121 (1st Cir. 1988), *cert. denied*, 490 U.S. 1107, 109 S.Ct. 3158, 104 L.Ed.2d 1021 (1989), and the Fifth Circuit in *Bagby v. General Motors Corp.*, 976 F.2d 919 (5th Cir. 1992) and *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985). *Luecke*, 85 F.3d at 360, n.6, 362, 362, n.9. (Appendix A- 7, A13-15.)

The court of appeals denied Schnucks' petition for rehearing.

REASONS FOR GRANTING WRIT

This case involves two circuit-splitting issues. The Eighth Circuit's opinion limits and narrows the doctrine of federal labor law pre-emption as applying only when the central factual inquiry to resolve a state claim depends upon an interpretation of explicit and literal terms of a collective bargaining agreement. The court of appeals found a state-law claim of defamation not to be pre-empted, because the express terms of the applicable collective bargaining agreement did not specifically delineate procedures concerning the investigation, enforcement and confidentiality of drug testing by the

employer, even though the unilaterally implemented drug testing policy enacted pursuant to the Management Rights Clause of the collective bargaining agreement did expressly delineate such procedures. This interpretation is contrary to prior holdings of this Court as to the implied rights contained within a collective bargaining agreement and to decisions on this issue in four (4) other circuit courts of appeal.

The holding of the Eighth Circuit effectively precludes consideration of an employer's defenses from the determination of whether a collective bargaining agreement must be interpreted to resolve a state law claim. There is also a split of opinion in the circuits as to the applicability of LMRA pre-emption where defenses to state law claims are based upon rights exercised by an employer pursuant to a collective bargaining agreement. This court was petitioned to resolve this dispute in 1992, but denied that petition for certiorari with a dissent by two Justices. *Schacht v. Caterpillar, Inc.*, 213 Ill.App.3d 169, 157 Ill.Dec. 196, 571 N.E.2d 1215, *cert. denied*, 503 U.S. 926, 112 S.Ct. 1306, 117 L.Ed.2d 527 (1992). The increasing confusion over both of these pre-emption issues warrants a resolution of these matters by the Supreme Court.

The Eighth Circuit's decision subjects a multitude of employee grievances over disciplinary investigations of work rule violations to lawsuits asserting state-court claims. As a practical matter, the decision holds that the following questions are not substantially dependent upon an interpretation of the collective bargaining agreement:

1) Is a unilaterally implemented drug and alcohol policy within the parameters of management rights granted in collective bargaining agreement?
2) Do the terms of the Management Rights clause granting to Schnucks the right to control operations, direct the working forces

and suspend or discharge for cause include the right to investigate violations of management's work rules?

3) Does the right to discipline, which is granted under a collective bargaining agreement, include the right to investigate potential work policy infractions and communicate matters related to the investigation intra-corporately?

The decision thereby undermines the national labor policy that the grievance procedure is a fair, efficient and peaceable means for resolving labor disputes.

I. INCONSISTENT CIRCUIT COURT DECISIONS AS TO WHETHER A COLLECTIVE BARGAINING AGREEMENT INCLUDES, FOR PURPOSES OF PRE-EMPTION, UNILATERALLY IMPLEMENTED DRUG TESTING PROCEDURES WARRANT A RESOLUTION BY THE SUPREME COURT.

A. The Eighth Circuit's holding is erroneous, because it limits the question of whether a state law claim is inextricably intertwined with an interpretation of a collective bargaining agreement to procedures expressly recited in the agreement. The decision overlooks the implied rights and duties contained within the labor contract.

The decision by the Eighth Circuit represents a significant departure from earlier decisions in the Eighth and four (4) other Circuit Courts of Appeal on the doctrine of pre-emption and further narrows the application of the pre-emption doctrine in a manner inconsistent with Supreme Court decisions and directives on this issue.

Schnucks' attempt to have Luecke take a drug test was done in pursuance of a comprehensive drug and alcohol policy which Schnucks unilaterally implemented

on September 22, 1992 after informing and bargaining with Local 88. The policy was implemented under the Management Rights Clause of the collective bargaining agreement granting to Schnucks the right to control operations and direct its working forces. The agreement in effect at the time of Luecke's job injury and testing did not contain express directives on drug testing or on the investigation of alleged violations of the rules contained within the drug policy.

The Eighth Circuit relied upon the absence of literal or explicit delineations of procedures in the labor agreement in holding that Luecke's defamation claim did not require interpretation of the agreement:

> Article V, however, said nothing about the procedures to be followed in conducting investigations and enforcing policies of the employer. The collective bargaining agreement in effect at the time this action arose made no mention whatever of the drug testing policy or of procedures for enforcement, nor did it impose any requirement of confidentiality.

Luecke, 85 F.3d at 361. (Appendix A-12.)

In so holding, the Eighth Circuit overlooked the seminal teachings of *United Steel Workers of America v. Warrior and Gulf Nav. Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) that a collective bargaining agreement is much more than the specific words of the contract, "[I]t is a generalized code to govern a myriad of cases which the draftsmen cannot fully anticipate." This Court further stated:[4]

> It is not unqualifiedly true that a collective bargaining agreement is simply a document by which the Union and employees have imposed

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[4] Quoting with approval from Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1498-99 (1959).

> upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many enforceable contingencies to make the words of the contract the exclusive source of rights and duties. One can not reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.

Id. 363 U.S. at 578-580, 80 S.Ct. at 1351.

In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 216, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985), this Court, in the context of a pre-emption issue, definitively rejected the concept that a labor contract is limited to express recitations in the written agreement:

> The [state] court evidently assumed that the only obligations the parties assumed by contract are those expressly recited in the agreement, in this case the right to receive benefit payments for non-occupational injuries. . . .
>
> The assumption that the labor contract creates no implied rights is not one that state law may make. Rather, it is a question of federal contract interpretation whether there was an obligation under this labor contract to provide the payments in a timely manner, and if so, whether Allis-Chalmers' conduct breached that implied contract provision.

Id. 471 U.S. at 214-215, 105 S.Ct. at 1913.

B. The Eighth Circuit's decision is in direct conflict with its own earlier decision and with the decisions of four (4) other circuits as to pre-emption based on the interpretation of implied, but not specifically delineated, management rights contained within a collective bargaining agreement.

In a case nearly identical to the instant matter, the Eighth Circuit held that an employee's libel claim was pre-empted, because the allegedly defamatory statements related to the plaintiff's involvement in a tire slashing incident which occurred at the workplace, and, as such, the dispute would be governed by the grievance procedure of the collective bargaining agreement. The court of appeals accordingly held that the slander claim could not be resolved without interpreting or analyzing the terms of the collective bargaining agreement. *Johnson v. Anheuser-Busch, Inc.*, 876 F.2d 620 (8th Cir. 1989).

The panel of the Eighth Circuit deciding the instant case attempted to distinguish *Johnson* simply by concluding that the bargaining agreement in this matter said nothing about the drug policy or about its enforcement. *Luecke*, 85 F.3d at 362. (Appendix A-14-15.) The allegedly slanderous comments in *Johnson*, as in the instant matter, provided the basis for the investigation of a violation of a plant rule, but the plant rule considered in *Johnson* was also ***not*** contained in that labor agreement.[5]

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[5] As to the allegedly slanderous comments in issue, the *Johnson* court stated: "The statements in question refer to the ongoing employment relationship between Mr. Johnson and Anheuser-Busch. As such, they relate to a dispute over an event occurring at the workplace and would be governed by the grievance procedure set forth in Article IX of the collective bargaining agreement. This count cannot be resolved without interpreting or analyzing the terms of the collective bargaining agreement. Thus, Section 301 pre-emption applies." *Johnson*, 876 F.2d at 624.

An investigation of alleged violations of a work rule prohibiting malicious mischief is no different than an investigation of work rules prohibiting drug usage and requiring drug testing. The only provisions of the collective bargaining agreement in *Johnson* which required interpretation, and which the Eighth Circuit in that earlier case found to be inextricably intertwined with the state claim for slander, were those provisions stating that wrongful discharge allegations and any matter involving the meaning, interpretation, or application of the agreement should be submitted to the grievance procedure. Similarly, the collective bargaining agreement in effect when Luecke was investigated and allegedly defamed also provided that any differences, disputes or complaints arising over the interpretation or application of the collective bargaining agreement are to be resolved through the grievance procedure.[6]

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[6] Luecke on appeal emphasized that he was not discharged or disciplined, arguing there was thus nothing to grieve. This is an inaccurate conclusion. The provision of the collective bargaining agreement mandating the bringing of grievances, by its terms, includes all differences or disputes or complaints over the interpretation of that contract. Article 6.1 and 6.5. (Appendix D-5.) Moreover, claims pre-empted by the LMRA because they are dependent on the collective bargaining agreement do not need to be specific to matters of discharge or discipline. In *United Steel Workers of America v. Rawson*, 495 U.S. 362, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990), this Court found that a state wrongful death negligence action was pre-empted even though the state law duty arose from the union having undertaken to perform safety inspections under the collective bargaining agreement. *Rawson* obviously did not involve any potential grievance relating to discharge or discipline, since the employees in question were deceased. Also, *Allis-Chalmers* was not an action relating to discharge or discipline but a state-law tort action for bad-faith delay in making disability-benefit payments, which this Court found to be pre-empted by § 301.

Also, the Eighth Circuit's holding in this matter is contrary to decisions in at least four (4) other circuits, none of which involved interpretation of an express or explicit provision of a collective bargaining agreement specific to the minute detail required by the court below.

In *Schlacter-Jones v. Gen. Tel. of Calif.*, 936 F.2d 435 (9th Cir. 1991), GTE terminated an employee who tested positive for drugs, as allowed by GTE's unilaterally implemented drug policy. The employee filed a state action for wrongful termination, breach of covenant of good faith and fair dealing, and violation of state constitutional rights of privacy and due process. The case was removed to federal court. In determining that all claims were preempted by the LMRA, the court held that rights derived from a collective bargaining agreement such as those to which Schlacter-Jones' complaint related may be direct or implied. The court further found that because GTE's drug policy was a part of the terms and conditions of employment applicable to the plaintiff, it was "immaterial for purposes of summary judgment that no provision of the CBA explicitly deals with drug testing or gives GTE the right to adopt drug and alcohol policies." *Schlacter-Jones*, 936 F.2d at 439, n.2. The Ninth Circuit agreed that the district court properly concluded that the unilaterally implemented drug policy was part of the collective bargaining agreement or at least contemplated by the agreement. The court reasoned that the plaintiff's claims implicated terms and conditions of her employment and

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The Tenth Circuit in *Johnson v. Beatrice Foods Co.*, 921 F.2d 1015 (10th Cir. 1990) also held that pre-emption shall *not* be limited to suspensions or disciplinary actions, where the labor agreement also allows "disputes" to be grieved.

thus were substantially dependent on the labor agreement for resolution.[7]

In the instant matter the Eighth Circuit noted that Schnucks' drug and alcohol policy, which specifically allows the release of information to the extent required by the company for use in investigations (Appendix E-5), was expressly later incorporated into its current labor agreement, but stated that it did not and need not decide whether Luecke's defamation claim would be pre-empted under these express terms. The court found, "it is enough that the earlier controlling agreement was entirely devoid of such terms." *Luecke*, 85 F.3d at 361. (Appendix A-13.) The court stated that it did not believe that Schnucks' unilateral adoption rendered its language a literal part of the agreement for purposes of the test set out in *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). The court thus took the opposite view of the Ninth Circuit in *Schlacter-Jones* that a unilaterally implemented drug policy is a term and condition of

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[7] The confusion is this area is demonstrated by the Ninth Circuit's inconsistent position analogous to the inconsistency of the Eighth Circuit in the instant matter as compared to its earlier decision in *Johnson*. In *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514 (9th Cir. 1995) the court refused to imply into the collective bargaining agreement a unilaterally adopted termination policy based on past practice and thus found a state law disability discrimination claim not to be pre-empted. However, in *Laws v. Calmat*, 852 F.2d 430, 433 (9th Cir. 1988) the Ninth Circuit held: "A drug and alcohol testing program, upon which all employees' continued employment depends, is a working condition whether or not it is specifically discussed in the CBA." The *Laws* court also held that although the manner of detecting employee intoxication was not in the collective bargaining agreement, the matter of testing was a subject for the collective bargaining process and not the courts and was thus pre-empted by § 301. *Id.*

employment contemplated by the collective bargaining agreement and which therefore must be interpreted to resolve state claims premised upon actions taken under that policy.

Similarly, in *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111 (1st Cir. 1988), *cert. denied*, 490 U.S. 1107, 109 S.Ct. 3158, 104 L.Ed.2d 1021 (1989), the First Circuit considered whether an employee's state claim of invasion of privacy, which arose from the employer's unilateral inauguration of a drug testing policy, was pre-empted by the LMRA. The First Circuit noted that invasion of privacy had two components under Massachusetts law: obtaining information and disclosing it, and further that under Massachusetts law the disclosure of private facts about an employee to other employees in the same corporation can constitute sufficient publication under the state right of privacy statute.[8] Finally, the First Circuit considered that the company's drug testing plan contemplated sharing the results of the test with managerial personnel in order to determine whether to terminate the employment of a worker who fails the test, but that this also implicated the statutorily protected area of privacy. The First Circuit reasoned that the balancing of the interest between the worker's privacy rights and the legitimate concerns of management were enmeshed in the collective bargaining pact. The First Circuit premised its holding on the determination that **the drug and alcohol testing program, upon which all employees' continued employment**

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[8] Under Missouri law, communications between company supervisors are not considered to be publications to third persons for purposes of defamation. However, defamatory statements made to non-supervisory employees by corporate officers or supervisors can constitute a publication for purposes of a defamation action. *Rice v. Hodapp*, 919 S.W.2d 240, 243 (Mo. banc 1996).

depends, is a working condition whether or not it is specifically discussed in the collective bargaining agreement. Secondly, the First Circuit held that in order to resolve the plaintiff's state law claims it would be necessary to study the meaning and scope of the management rights clause. The court stated that it could not ignore the management rights clause of a collective bargaining agreement merely because of its familiarity or breadth. *Jackson*, 863 F.2d at 120. Again, in *Jackson*, there was no express provision within the written collective bargaining agreement governing the method of investigations of violations of this unilaterally implemented drug policy.

Also, in *Johnson v. Beatrice Foods Co.*, 921 F.2d 1015 (10th Cir. 1990) a union employee brought a state court action claiming intentional infliction of emotional distress due to name-calling, ridicule, and other incidents of alleged harassment on the part of his supervisor. The Tenth Circuit held the claim pre-empted by the LMRA and found that each of the plaintiff's allegations directly related **either to explicit or to implied rights derived from the collective bargaining agreement**, because each of Johnson's allegations related to the manner in which discipline was carried out. The court then held that it could not be determined whether the company's conduct was outrageous without determining whether the conduct was allowed under either explicit or implied terms of the collective bargaining agreement. *Id.* at 1020.

Similarly, the Fourth Circuit in *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531 (4th Cir. 1991) found an employee's state claims of infliction of emotional distress, conversion, and negligence in care of bailment, which were premised upon the company's actions in disposing of the contents of the employee's locker, were pre-empted under the LMRA. Citing *United Steel Workers of America v.*

Warrior and Gulf Nav. Co., the Fourth Circuit held that in order for the claims to be pre-empted it was *not* necessary to have explicitly delineated terms of the duties and the rights of management in the collective bargaining agreement:

> The specifics as to management conduct regarding the lockers and tools need not be spelled out in all their detail and refinement for the collective bargaining agreement to be applicable. Rather the collective bargaining agreement consists, in addition to its express provisions, of an 'industrial common law – the practices of the industry and the shop – [which] is equally a part of the collective bargaining agreement although not expressed in it.'

McCormick, 934 F.2d at 536. The court found that the state claims were pre-empted, because in determining liability for those claims the court would need to inquire into whether the employer was legally entitled to act as it did. See also *Willis v. Reynolds Metals Co.*, 840 F.2d 254 (4th Cir. 1988) (slander, invasion of privacy, and intentional infliction of emotional distress claims pre-empted on the basis that the alleged wrongs directly dealt with management's labor agreement rights to conduct investigations into possible harassment of one employee and the associated right to confront the suspected employee); *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987) (invasion of privacy claim based on search by employer for illegal drugs pre-empted on basis that determination of the claim would require a decision as to whether the employer could require such a search under the labor contract).

Accordingly, the underlying premise which forms the foundation of the Eighth Circuit's decision, i.e., that in order to be pre-empted a claim must depend upon the interpretation of an explicit, detailed and literal term of a

collective bargaining agreement is incorrect and contrary to well-established tenets of federal labor law that a collective bargaining agreement contains implied rights and duties. To the contrary, the resolution of Luecke's defamation claim is directly dependent upon an interpretation of the implied rights and duties contained within the collective bargaining agreement between Schnucks and Local 88.

No Supreme Court decision has yet determined whether a drug policy (or other work rule) unilaterally implemented in the exercise of management rights is contained within a collective bargaining agreement for purposes of pre-emption inquiries. The confusion and inconsistent determinations among the circuit courts of appeal warrant a definitive ruling by this Court to resolve this issue of widespread application in labor-management relations.

II. THE SUPREME COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUITS AS TO WHETHER A STATE LAW CLAIM IS PRE-EMPTED BY A DEFENSE BASED ON A COLLECTIVE BARGAINING AGREEMENT.

A. The resolution of Luecke's state defamation claim, including Schnucks' defense, is substantially dependent upon and inextricably intertwined with an interpretation of the collective bargaining agreement to ascertain whether, as a matter of law, the allegedly defamatory statements were privileged.

In *Allis-Chalmers*, this Court stated the test for determining pre-emption:

> We do hold that when **resolution** of a state law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either

> be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law.

Allis-Chalmers, 471 U.S. at 222, 105 S. Ct. at 1916. (Emphasis added.)

Again, in *Lingle*, this Court emphasized that state law remedies are independent of the collective bargaining agreement where purely factual questions pertain to the conduct of the employee and the conduct and motivation of the employer, and **likewise where the defense against the claim involves a purely factual inquiry**. *Lingle*, 486 U.S. at 407, 108 S. Ct. at 1882.

In *Johnson v. Anheuser-Busch, Inc.*, 876 F.2d at 623 and in *Hanks v. General Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988) the Eighth Circuit also held that the pre-emption issue cannot be resolved solely on allegations found in a plaintiff's complaint. "**Rather, defenses, as well as claims, must be considered in determining whether resolution of the state law claim requires construing the collective bargaining agreement.**" *Id.*

As the Eighth Circuit recognized in its opinion, Schnucks has consistently maintained that it will assert a defense of qualified privilege to Luecke's state claim for defamation. The court correctly held:

> To make out such a defense, Schnucks would have to show that an otherwise defamatory statement was made in good faith by a speaker who had an interest in or duty with respect to the subject matter, to a person having a corresponding interest or duty. *Carter v. Willert Home Products, Inc.*, 714 S.W.2d 506, 513 (Mo. Banc 1986).

Luecke, 85 F.3d at 361. (Appendix A-12.) The court of appeals incorrectly concluded, however, that "while the provisions of the collective bargaining agreement will perhaps be 'consulted,' they need not be interpreted in order to resolve any qualified privilege defense that

Schnuck may raise in the state defamation proceeding." *Id.* In so holding, the Eighth Circuit misconstrued the inquiry which the trial court must make in order to determine the applicability of the defense of qualified privilege.

In *Carter*, an en banc Supreme Court of Missouri held that "the applicability of the defense of qualified privilege is a matter of law to be decided by the trial court." *Id.* at 513. In discussing this defense, the Missouri court noted that a communication by an employer involving the character of an employee is qualifiedly privileged if it is made in good faith by a person who has a duty, to a person having a corresponding interest or duty. As long as good faith is present, the person making the statement is not limited to facts that are within his personal knowledge but may and should pass on all relevant information that has come to him or her, regardless of whether he or she believes that to be true or not. *Id.* See also, *Rice*, 919 S.W.2d at 244.

It would be impossible for the state trial court to determine, as a matter of law, whether Schnucks' actions were privileged without interpreting the collective bargaining agreement. In order to make this determination, the trial court will have to answer the following questions:

1. Does the collective bargaining agreement grant to Schnucks the right to investigate potential infractions of work rules or management policy?
2. If so, as a part of its right to investigate, does Schnucks have the corresponding right or duty to release or share information on Plaintiff's failure to submit to a drug test with members of management or with persons standing in the stead of the plaintiff?

3. Would Kramer have violated the Management Rights Clause of the bargaining agreement if she informed Mrs. Luecke of Luecke's need to take a drug test and if she communicated to other management personnel that he failed to take the test when he went for treatment as alleged by the Plaintiff?
4. Is the drug and alcohol policy unilaterally implemented by Schnucks a term and condition of employment pursuant to the collective bargaining agreement?
5. If so, are the powers granted to Schnucks by the drug and alcohol policy, including the right to communicate information in the course of investigations of violations of the policy, reasonable and within the powers granted under the Management Rights Clause of the labor agreement?

The Eighth Circuit states that "this is not a case where the state-law defamation complaint attacks the propriety of Schnucks' drug policy or Schnucks' right to require a drug test." *Luecke*, 85 F.3d at 360. (Appendix A-9.) However, even if in theory the drug policy or the right to require a drug test is not being contested as a whole, the defamation claim does contest the right to enforce the drug testing policy, the methods used to investigate possible infractions of that drug policy and the manner of administering the policy.

A similar assertion was made in two Fifth Circuit cases, *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985) and *Bagby v. General Motors Corp.*, 976 F.2d 919 (5th Cir. 1992). In both of those cases, the plaintiffs alleged that the suspension and investigation procedure of the defendant employers had defamed them by virtue of other employees learning of the investigations. **In both cases, the Fifth Circuit found that to hold a company**

guilty of defamation for making such inquiries, even though the subject of the inquiries became known in the plant, would mean that a company would never be able to undertake to investigate a possible disciplinary situation in routine and proper ways. In both instances, the Fifth Circuit upheld the district courts' granting of summary judgments in favor of the employers on the ground that these state law claims were pre-empted by the LMRA, because the *resolution* of plaintiffs' claims would quite obviously require an interpretation of the collective bargaining agreements.[9] In so holding in *Strachan*, the Fifth Circuit reasoned:

> In simple terms each of these employees was suspected of violating the collective agreement in a way which would subject them to discipline by the company. . . . Both were suspended during the investigation. The investigations were negative, and they were exonerated and returned to full duty. **This routine procedure occurs thousands of times every year under collective bargaining agreements throughout the United States.** No matter in what glamorous garb it is dressed, the basic thrust of the appellants' claim is that a suspension and investigation for possible disciplinary action itself constitutes a tort under state law.
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> [The] various tort claims by the appellants demonstrate clearly an attempt to create major state court claims out of matters which are all part of a company claim of right under a collective bargaining agreement, and the employee's

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[9] As in the instant matter, in both *Strachan* and *Bagby*, the employees whose deeds had been investigated were exonerated and incurred no disciplinary action.

> right to challenge such claims through grievance procedure ending in binding arbitration. **To hold otherwise in this case would subject thousands of grievance procedures involving disciplinary investigations and disciplinary actions including such matters as careless destruction of production, chronic tardiness, drinking on duty, insubordination, to lawsuits asserting state court claims.** The conclusion that such claims are preempted by the [LMRA] reveals the wisdom and necessity of the established legal principle. Otherwise, the critically important aspect of collective bargaining which is involved in the establishment of the grievance procedure to protest breaches of labor contracts would be destroyed.

Strachan, 768 F.2d at 704, 705 (Emphasis added).

While the Eighth Circuit theoretically took note of the appropriate tests set forth by the Supreme Court in *Allis-Chalmers* and *Lingle*, the court failed to apply these tests and failed to analyze the legal inquiries which must be addressed for a trial court to determine whether the defense of privilege will apply and whether Kramer had a right and duty to investigate the violation of the drug testing policy and to share information related to her investigation. Also, it must be determined whether Kramer was acting within the scope of her duties to protect Luecke's due process rights pursuant to the bargaining agreement by advising Luecke or one in his stead of his need to take a drug test. These legal inquiries go to the heart of the collective agreement and require not merely 'consultation' of the labor contract but a meaningful and far reaching interpretation of the rights granted to management under that agreement. As this Court held in *Lingle*:

> . . . [I]nterpretation of collective bargaining agreements remains firmly in the arbitral realm;

> judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective bargaining agreements.

Lingle, 486 U.S. at 411, 108 S.Ct. at 1884.

B. The Circuit Courts of Appeal have been inconsistent in determining whether defenses, as well as claims, must be considered to decide whether resolution of a state-law claim requires interpretation of a collective bargaining agreement.

In 1992, this Court denied petitions for writs of certiorari in two cases decided by the Appellate Court of Illinois where the Illinois court, on the merits, held that state-law claims were pre-empted by a defense which invoked the provisions of a collective bargaining agreement. Justice White, joined by Justice Blackmun, dissented from the denial of the petitions for certiorari on the basis that the Supreme Court should resolve a conflict in the circuits as to whether a court must look to defenses to determine whether a claim requires interpretation of a labor agreement. *Schacht v. Caterpillar, Inc.*, 503 U.S. 926, 112 S.Ct. 1306, 117 L.Ed.2d 527 (1992). The dissent cited inconsistent holdings in *Smith v. Colgate-Palmolive Co.*, 943 F.2d 764, 769-771 (7th Cir. 1991); *Hanks v. General Motors Co.*, 859 F.2d 67, 70 (8th Cir. 1988); *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531, 545 (4th Cir. 1991) (en banc) (Phillips, J., dissenting); *Berda v. CBS, Inc.*, 881 F.2d 20, 25 (3rd Cir. 1989).

In *Smith v. Colgate*, the Seventh Circuit held that it could look beyond the plaintiffs' complaint to defenses to resolve whether plaintiffs' claims for fraud were dependent upon an interpretation of the labor agreement, because the case was initiated in federal court based on diversity jurisdiction and did not involve the issue of § 301 pre-emption for purposes of deciding removal from

a state court. However, the *Smith* court indicated that if the matter had been initiated in state court, then defenses could not have been considered. *Smith*, 943 F.2d at 770.

In *McCormick*, the Fourth Circuit found state claims premised upon the employer's acts in disposing of the contents of plaintiff's work locker pre-empted by considering the employer's defense that it had the right under the labor agreement to take the actions upon which the tort claims were premised. The *McCormick* court relied on its earlier decision in *Kirby v. Allegheny Beverage Corp.*, which held that an employee's state law invasion of privacy claim based on a search of his person and property was pre-empted, because recourse to the collective bargaining agreement was necessary to determine whether the employer was authorized to conduct the searches. The *McCormick* court also relied upon Seventh and Ninth Circuit decisions which found to be pre-empted state-law claims of intentional infliction of emotional distress by plaintiff-employees, on the basis that the court in making its decision would be required to determine whether the employer's conduct was authorized by the explicit or implicit terms of a labor agreement. See, *Douglas v. American Information Technologies Corp.*, 877 F.2d 565, 573 (7th Cir, 1989); *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142, 1149-50 (9th Cir. 1988). *McCormick*, 934 F.2d at 537-538. These decisions, while not explicitly stating that defenses are available in determining whether the court will be required to interpret a collective bargaining agreement, nevertheless, effectively hold that resolution of a claim encompasses an employer's defense that its conduct was permissible under the collective agreement.

More recently, the Fifth Circuit in *Reece v. Houston Lighting & Power Co.*, 79 F.3d 485 (5th Cir. 1996) held an employee's state-law civil rights claims of racial bias pre-empted, because an interpretation of the agreement was

made necessary by the employer's defense that its actions were legitimate and non-discriminatory and because its decisions on Reece's promotion and training were based upon rights contained within the collective bargaining agreement. *Id.* at 487. Again in *Jimeno v. Mobil Oil Corp.*, 66 F.3d at 1524 the Ninth Circuit stated that Mobil's potential defenses were also relevant to the pre-emption analysis. However, the court then determined that Jimeno's disability discrimination claim under California's Fair Employment and Housing Act was not pre-empted by Mobil's affirmative defense of its inability to accommodate Jimeno due to health and safety risks, because the collective bargaining agreement did not contain specific provisions governing accommodations.

Other courts, while not discussing consideration of defenses *per se*, have, nevertheless, considered potential employer defenses in determining whether a claim is pre-empted, where it is necessary to refer to the collective bargaining agreement to determine if a duty of care is established by the labor contract or to define the nature and scope of management's duties and rights. See, *Jackson v. Kimel*, 992 F.2d 1318, 1326 (4th Cir. 1993) (no pre-emption of state claim of intentional infliction of emotional distress based on allegations of coerced sexual intercourse, because this act could never be authorized under the collective bargaining agreement). Moreover, the courts taking this approach have emphasized that state-law claims are pre-empted to the extent that the employer's actions are based upon the exercise of collective bargaining rights, but not where the claims are based on behavior or conduct which is beyond the exercise of those rights and which conduct could never be justified or even contemplated by a collective bargaining agreement. See, e.g., *Baker v. Farmers Elec. Co-op., Inc.*, 34 F.3d 274 (5th Cir. 1994); *Perugini v. Safeway Stores, Inc.*, 935 F.2d

1083 (9th Cir. 1991); *Fox v. Parker Hannifin Corp.*, 914 F.2d 795 (6th Cir. 1990).

This approach makes sense and is in accord with the overall policy of the pre-emption doctrine. In order to maintain a uniform body of federal law for the enforcement of collective bargaining agreements and further to promote the grievance and arbitration process as the most efficient and peaceable means of solving labor disputes, no logical purpose would be served by drawing a bright line between the allegations of a plaintiff's complaint and potential defenses. The overall purposes of pre-emption are to prevent state courts from inconsistently interpreting federal labor law and to preserve the integrity of the arbitral process. Allowing state courts to interpret collective bargaining agreements when confronted with *defenses* premised upon labor contracts is just as likely to lead to inconsistent determinations as would state court interpretations based on *claims* derived from a labor contract.

CONCLUSION

The Supreme Court's writ to the Eighth Circuit is necessary to resolve these circuit-splitting issues. First, direction from the Supreme Court is necessary to decide whether a unilaterally implemented drug testing policy is considered to be a part of a labor agreement for purposes of the inquiry on § 301 pre-emption. Second, the Supreme Court's direction and instruction are required to resolve inconsistent holdings among the circuits as to whether defenses, as well as claims, are to be considered in determining whether resolution of a state-law action is substantially dependent upon the analysis of the terms of a labor agreement. The diverse reasoning among the circuits has contributed to an abrogation of the very policy

which the doctrine of pre-emption was designed to promote, i.e., consistent and uniform treatment of claims involving federal labor issues. The inconsistent approaches and situational analyses of the circuit courts of appeal and the many federal district courts in determining pre-emption demonstrate the widespread confusion in this area. This case presents the ideal venue for the Supreme Court to clarify these murky waters, in that both issues are presented under the facts of this matter. Accordingly, Petitioner urges this Court to grant the writ of certiorari in light of the substantial impact of this case upon federal labor law.

Respectfully submitted,

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APPENDIX A

Michael LUECKE, Plaintiff-Appellant,

v.

SCHNUCK MARKETS, INC., Defendant-Appellee.

No. 95-3080

United States Court of Appeals
Eighth Circuit

June 4, 1996

Employee brought defamation action, in state court, against his employer for allegedly telling others that employee refused to take drug test after workplace accident. Following removal, the United States District Court for the Eastern District of Missouri, Carol Jackson, J., granted defendant's motion for summary judgment on grounds that Labor Management Relations Act (LMRA) preempted claim. Plaintiff appealed. The Court of Appeals, Levin H. Campbell, Senior Circuit Judge, sitting by designation, held that LMRA did not preempt claim.

Reversed and remanded.

John McEachern, argued, St. Louis, Missouri, for appellant.

Brian Brink, argued, St. Louis, Missouri, for appellee.

Before WOLLMAN, CAMPBELL,* and MURPHY, Circuit Judges.

LEVIN H. CAMPBELL, Senior Circuit Judge.

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* The HONORABLE LEVIN H. CAMPBELL, United States Circuit Judge for the First Circuit, sitting by designation.

Plaintiff-appellant Michael Luecke appeals from a district court order granting summary judgment to defendant-appellee Schnuck Markets, Inc. ("Schnuck") on the ground that plaintiff's state law defamation action is preempted by section 301 of the Labor Management Relations Act (LMRA). Based on our reading of the Supreme Court's rule in Lingle v. Norge Div., Magic Chef, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988), and related cases, we reverse.

I.

Luecke, a Schnuck employee and member of Local 88 of the United Food and Commercial Workers, injured his hand while working on November 10, 1992. He reported to a medical facility selected by Schnuck to have his hand bandaged, and then was asked to disrobe completely in order to give a urine sample, pursuant to Schnuck's new unilaterally adopted drug and alcohol policy (effective September 14, 1992). The policy, which was written and disseminated to employees, provided in relevant part: "[I]f an Associate has an 'on the job accident' which results in a lost time situation there will be a blood test and/or urinalysis test as a routine part of the investigation of the circumstances present at the time of the accident." Schnuck says it adopted the policy pursuant to article 5 of its collective-bargaining agreement, which grants management the right to direct its work force.

Luecke says that he offered to produce a urine sample with his clothes removed except for the part of his shirt around his bandaged wrist. This apparently was unacceptable to medical personnel. Luecke left without

giving a urine sample. That afternoon, Jenise Kramer, a Schnuck manager, called Luecke's house and was told that he was not there. Luecke says that Kramer then informed his wife, without knowing who she was, that Luecke had "refused" to take a drug test, and that his employment would be terminated within 24 hours if he did not take one. Kramer offers a somewhat different version of this conversation in an affidavit; she says that after medical personnel informed her that Luecke had refused to take a drug test, she tried to contact him at home and spoke with someone "who eventually identified herself as being Mr. Luecke's wife." Kramer left a message whose "substance" was that after being involved in a work-related accident, Luecke had "failed to have a drug test," and "if he failed to take a drug test as soon as possible, his employment could be terminated."

Kramer and Luecke spoke on November 11, and the following day, Luecke took a drug test. As the results were negative, no discipline followed. Thereafter, Kramer and other Schnuck employees are said by Luecke to have published within and without the company the allegedly false statement that Luecke had "refused" to take a drug test.

In October 1994 Luecke sued Schnuck in state court, alleging defamation based upon Kramer's communication to Luecke's wife, and Kramer's and other employees' publication of Luecke's alleged refusal to take a drug test. Schnuck removed the action to federal court, arguing that plaintiff's claim arose under section 301 of the LMRA, which confers federal jurisdiction over actions for a breach of a contract between an employer and a labor organization. Schnuck then moved to dismiss the action,

or in the alternative, for summary judgment, contending that plaintiffs' claim was preempted, was time-barred, and failed to state a cause of action. The district court granted summary judgment to Schnuck, finding that plaintiff's state law defamation claim was preempted by section 301 of the LMRA. This appeal followed.

II. Discussion

[1] We review a grant of summary judgment de novo to determine whether the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In so doing, we construe the facts in the light most favorable to the non-movant, plaintiff.

[2] The dispositive question is that of subject matter jurisdiction. In removing the case to federal court, the defendant asserted federal question jurisdiction on the theory that the LMRA preempted plaintiff's state law defamation claim.[1] Plaintiff countered that the claim was not preempted and that the case should be returned to the state court.

[3][4] For federal question jurisdiction, the federal question generally must appear on the face of the complaint. See Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987). An exception to this rule, often applied in labor cases, holds that when "an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state

[1] As complete diversity was not satisfied here, the presence of a federal question was necessary for a proper removal.

law is considered, from its inception, a federal claim, and therefore arises under federal law." Id. at 393, 107 S.Ct. at 2430 (emphasis supplied). Applying this exception, the district court held that plaintiff's defamation claim was "inextricably intertwined" with the terms of Schnuck's collective-bargaining agreement with its employees, and was therefore preempted by section 301 of the LMRA. See id. at 394, 107 S.Ct. at 2431 ("Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.' ") (internal citation omitted). The district court held that the statements challenged by Luecke "involve the ongoing employment relationship between plaintiff and defendant and concern a work-related injury and its subsequent investigation. As such, they are governed by the grievance procedures set forth in the collective-bargaining agreement." The court also quoted from an early settlement letter to Schnuck from Luecke's attorney, who referred to the statements in question as occurring "[a]s a result of Schnuck's attempt to enforce a drug testing policy in violation of the Collective Bargaining Agreement with Local 88." Concluding that the case was properly removed, the court granted summary judgment in defendant's favor on preemption grounds.

[5][6] The Supreme Court has made clear that a state law claim is preempted by section 301[2] only if the

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[2] Section 301 provides:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as

claim is "inextricably intertwined" with the terms of a collective-bargaining agreement. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213, 105 S.Ct. 1904, 1912, 85 L.Ed.2d 206 (1985). The unanimous Court has stated, "[A]n application of state law is pre-empted by Sec. 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective-bargaining agreement." Lingle, 486 U.S. 399 at 413, 108 S.Ct. 1877 at 1885 (footnote omitted); see also Livadas v. Bradshaw, ___ U.S. ___, ___, 114 S.Ct. 2068, 2078, 129 L.Ed.2d 93 (1994) ("[W]e were clear [in Lingle] that when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished[.]") (citing Lingle, 486 U.S. at 413 n. 12, 108 S.Ct. at 1885 n. 12). The proposition follows that "a state law claim may involve analysis of the same set of facts as a claim arising under the collective bargaining agreement without compelling preemption." Hanks v. General Motors Corp., 906 F.2d 341, 343 (8th Cir.1990) (citing Lingle, 486 U.S. at 407-408, 108 S.Ct. at 1882-1883).

In Lingle, an employee's state-law action against her employer alleging that she was discharged in unlawful retaliation for claiming worker's compensation benefits

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> defined in this chapter, . . . may be brought in any district court of the United States having jurisdiction of the parties. . . .

29 U.S.C. Sec. 185(a).

was declared to be independent of the collective-bargaining agreement even though the agreement expressly prohibited discharge without proper or just cause and provided a grievance procedure to resolve any disputes over the interpretation or application of the agreement. Lingle, 486 U.S. at 401-402, 108 S.Ct. at 1879. The Court explained that the pertinent factual inquiry in the state retaliatory discharge action did not turn on any term of the agreement, but rather on the employee's conduct and the employer's conduct and motivation. See id. at 407, 108 S.Ct. at 1882. Because resolution of the state-law action did not require an interpretation of the collective-bargaining agreement, allowing it to be independently brought was "consistent both with the policy of fostering uniform, certain adjudication of disputes over the meaning of collective-bargaining agreements and with cases that have permitted separate fonts of substantive rights to remain unpre-empted by other federal labor-law statutes." Id. at 410-411, 108 S.Ct. at 1884.

[7][8][9] In light of the foregoing, we conclude that the district court erred in holding that plaintiff's state defamation action was preempted. Luecke alleges in the action that Kramer and other Schnuck employees, acting within the scope of their authority, published false statements with total disregard for their falsity, injuring his reputation in the community and business profession. To recover damages under state law, Luecke will need to establish that Kramer or other employees stated that he had "refused" to take a drug test, that the statements were false and were made with knowledge of or reckless disregard as to their falsity, that they were heard by others, and that they tended to expose Luecke to hatred

or ridicule and damaged his reputation. Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo. banc 1993); Missouri Approved Instruction (MAI) 23.10(2).[3] Keeping in mind the central factual inquiry – what was said to whom, whether it was false and knowingly or recklessly so, and whether damages resulted – we look to see whether an interpretation of the collective-bargaining agreement will be required in order to resolve the state claim. The answer, on the record here, is "no."

[10] Schnuck contends that resolution of the defamation claim and its defenses[4] depends upon interpreting two articles of the collective-bargaining agreement "and/or policies implemented pursuant to that agreement." First, Schnuck argues that it adopted the drug testing policy, enforcement of which underlay the allegedly defamatory statements, pursuant to authority conferred in article 5 of the agreement, giving management the right to direct its work force, "including the right to plan, direct and control operation, . . . [and] suspend and

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[3] Although subsection (1) of MAI 23.10 generally governs defamation claims brought by a private plaintiff, the elements stated here are derived from 23.10(2), which applies when a defendant's statements are qualifiedly privileged. At oral argument, the defendant's counsel said that Schnuck would assert a qualified privilege defense. To the extent this defense is applicable, plaintiff would carry an additional burden of showing that the defamatory statements were made with malice. Carter v. Willert Home Products, Inc., 714 S.W.2d 506, 513 (Mo. banc 1986).

[4] In ascertaining whether the state action will require an interpretation of the collective-bargaining agreement, we consider probable defenses as well as the claim itself. See Hanks v. General Motors Corp., 859 F.2d 67, 70 (8th Cir.1988).

discharge for proper cause." Second, article 6 establishes grievance procedures to be followed for "any differences, disputes or complaints aris[ing] over the interpretation or application of the contents of this Agreement." Conferences are pursued first, then arbitration if necessary.[5]

But this is not a case where the state-law defamation complaint attacks the propriety of Schnuck's drug policy or Schnuck's right to require drug tests.[6] What is challenged is the employer's alleged dissemination to others of supposedly false information, i.e., that plaintiff had refused to submit to the test. Plaintiff's counsel reiterated at oral argument that his client did not challenge Schnuck's right to require its employees to be tested. Nor is plaintiff contesting management's right to suspend or discharge an employee for failure to take the test. Luecke took the drug test, passed it, and was not suspended or

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[5] The parties have not included in the record on appeal a complete copy of the collective-bargaining agreement in effect at the time this action arose. We accordingly limit our review to the provisions relied upon by Schnuck in support of preemption.

[6] Cf. Schlacter-Jones v. Gen. Tel., 936 F.2d 435, 441 (9th Cir.1991) (employee's state law claims were preempted by section 301 where the "allegations turn on the propriety of [the company]'s Drug Policy and cannot be assessed without examining the CBA to determine whether the Drug Policy was a valid term and condition of employment[ ]"); Jackson v. Liquid Carbonic Corp., 863 F.2d 111, 118, 121 (1st Cir.1988) (employee's state law claims were preempted by section 301 where "[t]he central thesis of his suit questions whether [the employer]'s drug-testing protocol was reasonable[ ]" in light of the union's cession of authority to the employer to conduct medical examinations and to post reasonable rules), cert. denied, 490 U.S. 1107, 109 S.Ct. 3158, 104 L.Ed.2d 1021 (1989).

discharged. Resolving Luecke's defamation claim will not depend upon construing article 5: no express or implied term in that provision guides the factual inquiry into whether the speakers actually said Luecke refused to take the test, whether their statements were false, whether malice attached, and whether damages resulted. See Hawaiian Airlines, Inc. v. Norris, ___ U.S. ___, ___, 114 S.Ct. 2239, 2248, 129 L.Ed.2d 203 (1994) (reiterating Lingle's holding that a state law claim involving "purely factual questions" that do not turn upon the terms of a collective-bargaining agreement are not preempted by section 301); see also Hanks, 906 F.2d at 345 (tort claims against employer who required employee to work with a person who sexually abused her daughter were not preempted, as "none of the terms or provisions of that agreement shed any light on the appropriateness of [the employer's] conduct[ ]"); Tellez v. Pacific Gas & Elec. Co., 817 F.2d 536, 538 (9th Cir.) (defamation claim against employer who distributed a suspension letter saying employee had bought drugs on the job was not preempted, as claim did not assert rights under the collective-bargaining agreement, and the agreement did not require management to send such a letter or provide guidelines if such a letter was sent), cert. denied, 484 U.S. 908, 108 S.Ct. 251, 98 L.Ed.2d 209 (1987).

Neither is Luecke's claim dependent upon a construction of article 6, which sets forth grievance procedures. As in Lingle, these procedures are available for a broad range of disputes, and the mere possibility that Luecke could file a grievance on these same facts does not dictate that his claim is preempted. See Lingle, 486 U.S. at 408-410, 108 S.Ct. at 1882-1884; Hanks, 906 F.2d at

345 ("The crucial issue under Allis-Chalmers is not whether a claim can be taken through the grievance process but whether the state law tort claim being asserted purports to give meaning to the terms of the labor contract.") (citing Keehr v. Consolidated Freightways of Delaware, Inc., 825 F.2d 133, 137 (7th Cir.1987)). Here, the state law defamation action will not, to any material degree, give meaning to the terms of article 5 or 6. The record shows that the union grieved the implementation of the drug testing policy pursuant to article 5. Luecke is not repeating that effort; he represents that he has no intention to do so.[7]

[11] Schnuck nevertheless maintains that the state action would require interpreting article 6, because permitting Luecke to bring a defamation action in state court opens the door to other employees doing the same and forgoing arbitration. The short answer to this is that employees are not required to use grievance procedures exclusively, in preference to state lawsuits, so long as a parallel state action does not require interpreting the collective-bargaining agreement. Lingle, 486 U.S. at 408-410, 108 S.Ct. at 1882-1884.

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[7] Luecke's counsel stated in an early settlement letter that the defamatory statements occurred "[a]s a result of Schnuck's attempt to enforce a drug testing policy in violation of the Collective Bargaining Agreement with Local 88." The letter was written a few months after the union filed its grievance regarding that policy. The complaint, filed almost two years later, contains no indication that the drug testing policy was being challenged in the action, and Luecke's counsel expressly confirmed at oral argument that it was not.

[12] Nor do Schnuck's likely defenses depend upon an interpretation of the collective-bargaining agreement. Schnuck says that it will assert a defense of qualified privilege which will require reference to the agreement. To make out such a defense, Schnuck would have to show that an otherwise defamatory statement was made in good faith by a speaker who had an interest in or duty with respect to the subject matter, to a person having a corresponding interest or duty. Carter v. Willert Home Products, Inc., 714 S.W.2d 506, 513 (Mo. banc 1986) (citation omitted).

Schnuck contends that in speaking to Luecke's wife, its manager, Jenise Kramer, was carrying out her duty to ensure compliance with the drug testing policy. Her communications, the argument goes, were simply made in good faith furtherance of Schnuck's right to control the work force under article 5. However, Luecke's defamation claim does not deny that Kramer was acting pursuant to authority granted by Schnuck, nor that Schnuck had a right to control its work force. What plaintiff contests is Kramer's right to pass along to his wife or others the allegedly false information about his refusal to be tested. Article 5, however, said nothing about the procedures to be followed in conducting investigations and enforcing policies of the employer. The collective-bargaining agreement in effect at the time this action arose made no mention whatever of a drug testing policy or of procedures for enforcement, nor did it impose any requirement of confidentiality.

We recognize that, since the incident in question, Schnuck has expressly incorporated the drug testing policy into its current collective-bargaining agreement. The

new agreement apparently contains language prohibiting dissemination of records or their contents to any third party except with the employee's written consent or for other limited reasons.[8] We need not, and do not, decide whether a defamation claim of the type brought here would be preempted under these express terms; it is enough that the earlier controlling agreement was entirely devoid of such terms. To be sure, two months before the present incident, management had unilaterally promulgated a written drug testing policy which included the same confidentiality provision. But absent its incorporation within the collective-bargaining agreement – or absent incorporation of a compatible management rights clause, e.g., covering the performance of medical examinations, or some longstanding practice or custom from which to infer incorporation – we do not believe that Schnuck's unilateral adoption of the policy rendered its language, in these circumstances, a literal part of the agreement for purposes of the test set out in Lingle.[9] We conclude that while the provisions of the

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[8] The recent collective-bargaining agreement provides that company records "shall be kept in strict confidence, and neither said records nor the contents thereof shall be disseminated to any third party except upon written authorization by the Associate, or to the extent required by law, or to the extent required by the Company for use in any proceeding involving the Associate."

[9] See Jimeno v. Mobil Oil Corp., 66 F.3d 1514 (9th Cir.1995) (refusing to imply into collective-bargaining agreement a unilaterally adopted, unwritten termination policy followed in practice for years, absent clear and unmistakable evidence that the union accepted the policy and waived its members' rights under state law); but cf. Schlacter-Jones, 936 F.2d at 440 ("A

collective-bargaining agreement will perhaps be "consulted," they need not be interpreted in order to resolve any qualified privilege defense that Schnuck may raise in the state defamation proceeding. See Livadas, ___ U.S. at ___, 114 S.Ct. at 2079 ("the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished") (citing Lingle, 486 U.S. at 413 n. 12, 108 S.Ct. at 1885 n. 12).

The instant case is distinguishable from Johnson v. Anheuser Busch, Inc., 876 F.2d 620 (8th Cir.1989), in which an employee accused by co-workers of slashing tires in a company lot was discharged for violating plant rules. He grieved the discharge, was reinstated, and then brought multiple tort claims, including libel and slander, against his employer and co-workers. This circuit held that the libel claim against the employer was preempted by section 301. Because the allegedly false accusations resulted in the employee's discharge for violating specific misconduct rules, consideration of the collective-bargaining agreement was needed to ascertain whether the discharge was wrongful. See id. at 624. The slander claim against the co-workers was also preempted, because the allegedly false accusations "relate[d] to a dispute over an

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drug and alcohol testing program is a working condition whether or not it is specifically discussed in the [collective-bargaining agreement].") (citation omitted); Jackson, 863 F.2d at 120 (viewing a unilaterally passed drug testing policy as a "working condition" within the scope of a collective-bargaining agreement, to be evaluated for reasonableness, where union had accepted employer's authority to conduct medical examinations and to pass "reasonable" rules).

event occurring at the workplace and would be governed by the grievance procedure" in the agreement. Id. However, the libel claim against a co-worker was not preempted, because the elements of that claim did not require construction of any term of the agreement. See id. at 625.

Unlike Johnson, Luecke's claim against his employer does not depend on construing a term of the collective-bargaining agreement. Luecke ultimately took the required drug test, which was negative, and no discharge or other discipline resulted. The allegedly defamatory statement by Kramer was part of the company's attempt to enforce Schnuck's drug testing policy, but the collective-bargaining agreement then in effect said nothing about such a policy or its enforcement, or even about some more general management right to require medical examinations to ensure employees' fitness. But cf. Strachan v. Union Oil Co., 768 F.2d 703, 705 (5th Cir.1985) (holding that suspended employees suspected of drug use were preempted from suing their employer for defamation and other torts, where "[t]he issues concerning the medical examinations and involving the blood and urine tests are clearly within the power of the company under the collective bargaining agreement to insist upon medical examinations when there is doubt as to the physical condition of an employee at work[ ]"); see also Bagby v. General Motors Corp., 976 F.2d 919 (5th Cir.1992) (holding that defamation claim arising out of temporary suspension of worker was preempted, where employer followed specific disciplinary procedures in collective-bargaining agreement and company policy).

As we find that Luecke's defamation action is not preempted by section 301, there is no federal question authorizing federal jurisdiction over the case. We remand the case to the district court with instructions to remand it to the state court from which it was removed.

So ordered.

APPENDIX B

Michael LUECKE, Plaintiff

v.

SCHNUCK MARKETS, INC., Defendant

No. 4:94-CV-2274 (CEJ)

United States District Court
Eastern District of Missouri
Eastern Division

June 28, 1995

MEMORANDUM

This matter is before the Court on defendant's motion to dismiss or, in the alternative, for summary judgment. *See* Fed. R. Civ. P. 12(b)(6) and 56. Plaintiff opposes this Motion.

Plaintiff initiated this action in the Circuit Court of the County of St. Louis, Missouri asserting a claim for defamation. Defendant removed the action to this Court pursuant to 28 U.S.C. § 1441(b), arguing that plaintiff's claim is preempted by the Labor Management Relations Act ("LMRA"), 29 U.S.C. S 151, *et seq.*

Plaintiff is employed by the defendant and is a member of the United Food and Commercial Workers, Local Number 88, AFL-CIO ("Local 88"). As such he was covered by the applicable collective bargaining agreement. Section 5.1 of the collective bargaining agreement provides that defendant has the "right to plan, direct and control operations, hire, suspend or discharge for proper cause, transfer or relieve employees from duty because of lack of work, or for other legitimate reasons. . . . "

Pursuant to this provision, defendant adopted a drug and alcohol policy in September 1992 and notified the members of Local 88 of the policy's implementation.

The policy provides that if an employee sustains an on-the-job injury that results in "a lost time situation", the employee will be required to submit to a blood test and/or urinalysis test as a routine part of the investigation. The collective bargaining agreement also includes a grievance procedure.

On November 10, 1992 plaintiff injured his hand while working for the defendant. Following the injury, plaintiff reported to a medical facility that had been selected by the defendant. Plaintiff alleges that he was unable to give a urine specimen in a manner satisfactory to the medical personnel. Consequently, plaintiff did not take a drug test as required by defendant's policy.

On November 10, 1992, Jenise Kramer, defendant's manager of equal employment opportunity and counseling, called plaintiff's house and asked to speak to plaintiff. Plaintiff's wife told Kramer that plaintiff was not at home. Kramer then allegedly told plaintiff's wife that plaintiff had been injured at work, that he had refused to take a drug test, and that his employment would be terminated within 24 hours if he did not submit to a drug test. Plaintiff eventually submitted to the drug test and the results were negative.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment the court is required to view the facts in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences to be drawn from the underlying facts. *AgriStor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir. 1987). The moving party bears the burden of showing both the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986); Fed. R. Civ. P. 56(c). Once the moving party has met its burden, the non-moving party may not rest on the allegations of his pleadings but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists. Fed. R. Civ. P. 56 (e). Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corporation v. Catrett*, 477 U.S. 317, 322 (1986).

Plaintiff argues that this Court lacks subject matter jurisdiction because he has raised a state common law claim that is not preempted by the LMRA. Under the "well-pleaded complaint" rule, federal preemption raised as a defense does not ordinarily convert a state law claim into a federal one, and the action is not removable to federal court. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). However, once an area of state law has been completely preempted any claim that arises under the

preempted state law is considered to have arisen under federal law. *Id.* at 393; *King v. Hoover Group, Inc.*, 958 F.2d 219, 222 (8th Cir. 1992) (complete preemption applies to § 301 of the LMRA). The Court finds that this case was properly removed.

Section 301 of the LMRA confers upon the federal courts jurisdiction over actions for breach of collective bargaining agreements between employers and labor organizations. 29 U.S.C. § 185(a). Section 301 preempts state law tort claims when the resolution of the state law claim substantially depends upon an interpretation of the collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). The state law claim is preempted when it is "inextricably intertwined with consideration of the terms of the labor contract." *Id.* at 213. If the state law claim does not require construction of the collective bargaining agreement, even if analysis of the same set of facts would be required to decide a dispute arising under the collective bargaining agreement, then the claim is not preempted. *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 408-410 (1988). Defenses as well as claims must be considered in determining whether resolution of the state law claim requires construction of the collective bargaining agreement. *Hanks v. General Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988).

The scope of Section 301's preemption was considered by the Eighth Circuit in *Johnson v. Anheuser Busch, Inc.*, 876 F. 2d 620, 623 (8th Cir. 1989). In that case, the plaintiff brought a libel action against his co-workers who had reported to company officials that plaintiff had vandalized a co-worker's car. The court found that the alleged false accusations directly related to the plaintiff's

employment relationship with the defendant company and, as such, would be governed by the grievance procedure set forth in the collective bargaining agreement. The court held that the libel claims that were based on the individual defendants' statements to the company authorities was preempted by Section 301. However, a libel claim based on a statement made by a defendant to his insurance company accusing the plaintiff of vandalism was held not to be preempted by Section 301 because resolution of the claim did not require construction of the collective bargaining agreement.

Plaintiff alleges that Kramer made the slanderous statements within the scope of her employment. The statements in question involve the ongoing employment relationship between plaintiff and defendant and concern a work-related injury and its subsequent investigation. As such, they are governed by the grievance procedures set forth in the collective bargaining agreement. *See Johnson*, 876 F.2d at 624. In a letter to defendant dated December 30, 1992, plaintiff's counsel wrote, in pertinent part:

> As a result of Schnucks' attempt to enforce a drug testing policy in violation of the Collective Bargaining Agreement with Local 88, certain defamatory per se statements were published concerning Mr. Luecke's alleged refusal and/or failure to take a drug test.

As this letter clearly indicates, even plaintiff's attorney has taken the position that this dispute involves the interpretation of the collective bargaining agreement. The Court finds that the defamation claim is inextricably

intertwined with consideration of the terms of the collective bargaining agreement is preempted by Section 301. *See Allis-Chalmers,* 471 U.S. at 213.

Because plaintiff's claim is preempted by Section 301 of the LMRA, defendant's motion for summary judgment will be granted.

CAROL E. JACKSON
UNITED STATES
DISTRICT JUDGE

Dated this 28th day of June, 1995.

Michael LUECKE, Plaintiff

v.

SCHNUCK MARKETS, INC., Defendant

No. 4:94-CV-2274 (CEJ)

United States District Court
Eastern District of Missouri
Eastern Division

June 28, 1995

ORDER

In accordance with the Memorandum filed herewith this date,

IT IS HEREBY ORDERED that defendant's motion for summary judgment is granted.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment in favor of the defendant and against the plaintiff. The plaintiff shall bear the costs of this action.

CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 28th day of June, 1995.

APPENDIX C

Michael LUECKE, Appellant

v.

SCHNUCK MARKETS, INC., Appellee

No. 95-3080EMSL

United States Court of Appeals
For the Eighth Circuit

July 24, 1996

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 24, 1996

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

AGREEMENT

between

SCHNUCK MARKETS, INC.

St. Louis

and

UNITED FOOD AND COMMERCIAL WORKERS

Local No. 88, A.F.L.-C.I.O. and C.L.C.

EFFECTIVE

September 3, 1989

THROUGH

June 5, 1993

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AGREEMENT

This Agreement has been entered into by and between Schnuck Markets, Inc., St. Louis hereinafter designated as the Employer and the United Food and Commercial Workers Union, Local No. 88, AFL-CIO-CLC, hereinafter designated as the Union.

The Employer will not recognize any other collective bargaining agency nor enter into any other agreement setting forth hours, wages, and conditions of employment as herein defined during the life of this Agreement.

ARTICLE 1
PREAMBLE

The Employer and the Union each represent that the purpose and intent of this Agreement is to promote cooperation and harmony, to recognize mutual interests, to provide a channel through which information and problems may be transmitted from one to the other, to formulate rules to govern the relationship between the Union and the Employer, to promote efficiency and service, and to set forth herein, the basic agreements covering rates of pay, hours of work and conditions of employment.

ARTICLE 2
BARGAINING RIGHTS

Section 2.1 The Union shall be the sole and exclusive bargaining agent for all Meat, Seafood, Poultry, Barbecue, Cooked Meat and Delicatessen Department employees, including Head Meat Cutters, Journeymen, Service Meat Department Journeymen, Apprentices, Wrappers and

Clean-Up Employees employed in Self-Service and Service markets. This Agreement shall be applicable to the Employer's meat markets, supermarket departments, multiple markets that are presently owned, leased, acquired, operated or supervised by the Employer located in the City of St. Louis and St. Louis County, St. Charles and St. Charles County, Jefferson County, Missouri and Madison County, Illinois (excluding employees presently under contract with other Union locals and employees excluded by the National Labor Relations Act of 1947 as amended) during the term of this Agreement.

* * *

ARTICLE 5

MANAGEMENT RIGHTS

Section 5.1 The Management of the business and the direction of the working forces, including the right to plan, direct and control operations, hire, suspend or discharge for proper cause, transfer or relieve employees from duty because of lack of work, or for other legitimate reasons, shall be vested in the Employer, provided, however, that it will not be used for the purpose of discrimination against any employee, and provided it shall in no way conflict with any of the terms of this Agreement.

* * *

ARTICLE 6

GRIEVANCE AND ARBITRATION

Section 6.1 If any differences, disputes or complaints arise over the interpretation or application of the contents of this Agreement, there shall be an earnest effort on the part of the parties to settle such promptly through the following steps:

STEP 1. By conference between the aggrieved employee, the shop steward, or both, and the manager of the store within five (5) working days of the occurrence of the grievance.

STEP 2. By conference between the Business Representative, with or without the shop steward of the Union and the store manager or his supervisor within ten (10) working days of the occurrence of the grievance.

STEP 3. By conference between an official or officials of the Union and the Employer's designated representative within fifteen (15) working days of the occurrence of the grievance.

STEP 4. In the event the last step fails to settle the complaint, it may be referred to arbitration within five (5) days.

Section 6.2 In case of a dispute as to wages, the Employer agrees to submit, to an authorized representative of the Union, bonafide copies of the employee's payroll and social security records.

Section 6.3 At any step in this grievance procedure, the Executive Board of the Local Union shall have the final authority, in respect to any aggrieved employee

covered by this Agreement, to decline to process a grievance, complaint, difficulty or dispute further if, in the judgment of the Executive Board, such grievance or dispute lacks merit or lacks justification under the terms of this Agreement to the satisfaction of the Union Executive Board.

Section 6.4 The Employer shall have the right to call a conference with officials of the Union for the purpose of discussing his grievances, criticisms, or other problems.

Section 6.5 It is understood and agreed that all employees within the bargaining unit covered by this Agreement must exercise all their rights, privileges or necessary procedures under this Agreement, International and Local Union Constitution, in the settlement of any and all complaints or grievances filed by such employees, before taking any action outside of the scope of this Agreement for the settlement of such grievances.

Section 6.6 No grievance may be presented later than ten (10) calendar days after the occurrence from which such grievance arose. Grievances which progress past Step 2 shall be reduced to writing.

Section 6.7 Disciplinary action which may result in layoff or discharge, will, if requested by the employee, be in the presence of a Union Representative. If such Union Representative is not available, another member of the bargaining unit may be present.

Section 6.8 The Employer and the Union shall mutually agree to an impartial arbitrator to hear said arbitration case, however, if said arbitrator cannot be chosen within three (3) days, then the Federal Mediation and

Conciliation Service will be requested to furnish a panel of seven (7) names from which the arbitrator may be chosen. The arbitrator will be selected within seven (7) days after the receipt of the panel by alternately striking names. The party striking first will be determined by the flip of a coin. The decision of the arbitrator shall be binding on both parties. The expenses of the arbitrator shall be paid for jointly.

Such arbitrator shall not be empowered to add to, detract from, or alter the terms of this Agreement.

APPENDIX E

PLEASE POST

TO: All Schnuck Associates who are Members of U.F.C.W. Union Local No. 88

FROM: Bill Bredenkoetter

DATE: September 1, 1992

RE: **Introduction of Drug and Alcohol Policy**

Attached is the new Drug and Alcohol Policy which will become effective September 14, 1992. We urge you to study it and become familiar with it.

Drug and alcohol abuse in the workplace and socially are major problems in our country today. According to national statistics, they are prime causes of accidents on the job, poor attendance, poor performance, and poor attitudes.

As part of our new Substance Abuse Policy, Associates who are involved in a reported injury shall be subject to Drug and Alcohol testing under the "injury-on-the-job" provision of our Drug and Alcohol Policy. If the injury falls within one or more of the following categories testing will *not* be required:

1. Requires no outside medical treatment;
2. Repetitive trauma injuries or other occupational diseases;
3. The result of willful violence or threats of a third party.

Refusal to be tested will result in immediate discharge.

It is believed that the benefits to be derived from the reduction in the number of accidents, the greater safety of all Associates, and the rehabilitation or termination of those who, because of alcohol or drugs, are a burden upon all other Associates, will more than make up for any inconvenience or loss the rest of us must be subjected to. The Company earnestly solicits the understanding and cooperation of all Associates in implementing the policies set forth.

As you read the policy, you will note we will not tolerate use on the premises or allow Associates to work while under the influence of drugs or alcohol.

The intent of the program is to keep drug and alcohol problems out of the workplace. We are encouraging any Associate who may have a drug or alcohol problem to seek help. Further, our intent is to work with those of you who have problems and help you work through them, but we cannot help you unless you allow us to do so. Talk with your Store Manager, or contact the Local 88 Health and Welfare Trust Fund's Employee Assistance Program (EAP) at 991-1810.

WRB/dm
Attachment

DRUG AND ALCOHOL POLICY
MEAT/DELICATESSEN/SEAFOOD ASSOCIATES

The Company recognizes the seriousness of substance abuse in our society and the need to approach this problem in a progressive manner which recognizes the legitimate privacy rights of its Associates. With that in

mind, the Company has developed the following Drug and Alcohol Policy to be effective September 14, 1992.

It is a violation of this Policy for an Associate to be on the premises of the Company under the influence of a controlled substance or alcohol which may result in disciplinary action up to and including discharge.

In addition, the use of controlled substances or the consumption of alcohol during breaks or meal periods is strictly prohibited and subjects the Associate to discharge for the first offense.

Any associate found to be consuming alcoholic beverages, or using a controlled substance, while on duty or while on Company property, will be subject to immediate discharge.

Where the Company believes there is a reasonable basis that an Associate is under the influence of a controlled substance or alcohol, the Company may request the Associate to submit to a testing procedure consistent with the steps set forth below. At the time that such a request is made, both the Associate and the steward (or in the event of the steward's absence, another member of the bargaining unit) shall be advised verbally of the facts forming the basis of the Company's belief that the Associate is under the influence of controlled substances or alcohol. If the Associate refuses to take the test and if the Company had a reasonable basis for believing that the Associate was under the influence of controlled substances, or alcohol, then the Associate will be discharged.

In addition to the above, if an Associate has an "on the job accident" which results in a lost time situation

there will be a blood test and/or urinalysis test as a routine part of the investigation of the circumstances present at the time of the accident.

Any test performed under this Policy shall be performed at a clinic or hospital at the Company's expense. The Associate shall be compensated for all time involved with the initial testing and for travel to and from the test site.

For alcohol, one test is sufficient. That test will be a blood test.

For controlled substances, two tests may be performed on the sample taken. The first test performed shall be a screening test of an enzyme immunoassay more commonly called the EMIT test. Should the EMIT test be negative, no further tests will be performed. Should the EMIT test be positive, a second confirming test shall be performed. That test shall be the Gas Chromatography/ Mass Spectromoty (GC/MS) test.

In the event that the tests prove positive for a controlled substance or alcohol, the Associate will be subject to discipline up to and including discharge. However, the Company at their sole discretion, may elect that the Associate be evaluated through the Local 88 Health and Welfare Trust Funds' EAP and if recommended by the EAP, the Associate must participate in a substance abuse and/ or drug treatment program as a condition of continued employment.

To the extent required to enable the Associate to participate in the program, the Associate shall be allowed to take an unpaid leave of absence in accordance with the

Leave of Absence provisions of the collective bargaining agreement.

Cost of any rehabilitation program shall be the responsibility of the Associate or their medical program if applicable. Should the Associate refuse to participate in a treatment program, he/she will be discharged.

As a condition of returning to work after the successful completion of the rehabilitation program, an Associate who participated in such a treatment program will be subject to two (2) random tests during the first (1st) year after completion of said program. In the event the random test proves positive for controlled substances or alcohol, the Associate will be subject to discipline up to and including discharge.

Company records shall be kept in strict confidence, and neither said records nor the contents thereof shall be disseminated to any third party except upon written authorization by the Associate, or to the extent required by law, or to the extent required by the Company for use in any proceeding involving the Associate.

In the event any test results do not establish that the Associate was under the influence of alcohol or tested positive for controlled substances, then the Company shall expunge from its records all references to the testing.